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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, ~~1941~~ 1942

No. ~~1128~~ 70

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, ET AL.

vs.

METROPOLITAN LIFE INSURANCE COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED APRIL 9, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1128.

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, ET AL.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 11, 1942.

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[fol. 1] **IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941**

No. 7933

ADRIAN ETTELSON and JOSEPH A. FEDER, JACK RINZLER and Simon Fabian, also known as Simon H. Fabian, guardians of the person and property of Harriot also known as Harriet Ettelson, and Joseph A. Feder, Jack Rinzler and Simon Fabian, also known as Simon H. Fabian, guardians of the person and property of Doris Ettelson, Plaintiffs-Appellants

v.

METROPOLITAN LIFE INSURANCE COMPANY, Defendant

Certificate to the Supreme Court of the United States

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF FACTS

In the above entitled case an appeal has been taken to this court from an order of the District Court of the United States for the District of New Jersey entered on December 29, 1941.

The plaintiffs' complaint states in five counts claims for sums alleged to be due and payable to the plaintiffs by the defendant under certain policies of insurance issued by it upon the life of Richard Ettelson, who died on July 11, 1939. The complaint was filed in the New Jersey Supreme Court and on January 16, 1940 was removed by the defendant to the District Court of the United States for the Dis-
[fol. 2] trict of New Jersey.

The defendant filed in the district court on January 20, 1940 an answer to the complaint which set up a series of defenses to the effect that the policies in suit were obtained by the fraud of the insured and are void because of material false statements made by the insured in the application for the said policies. The answer did not aver that the said false statements were knowingly and intentionally made. The defendant filed with its answer a counterclaim which

also alleged that the policies in suit were obtained by the fraud of the insured and are void because of the said material false statements made by the insured in the application for the said policies, and prayed that the policies be decreed null and void upon the return by the defendant of the premiums paid thereon and that the plaintiffs be enjoined from further prosecuting their action at law against the defendant.

Thereafter the plaintiffs moved the district court to dismiss the defendant's counterclaim upon the ground that the "defendant has an adequate remedy on the law side of the Federal Court in the action at law instituted in the New Jersey Supreme Court November 13, 1939 and removed by defendant to the Federal Court and in which issue has since been joined", and that "said counterclaim fails to state a claim upon which equitable relief can or should be granted by the Federal Court." On December 26, 1941 the district court filed its opinion (42 F. Supp. 488) in which it concluded that the plaintiffs' motion to dismiss the counterclaim should be denied and on December 29, [fol. 3] 1941 the district court entered the following order:

It is Ordered on this 29th day of December, 1941 on motion of McCarter, English & Egner, attorneys for the defendant and counterclaimant, Metropolitan Life Insurance Company, that the motion of the plaintiffs to strike out and dismiss the said counterclaim be and it is denied,

It is further Ordered that the issue raised by the counterclaim of the Metropolitan Life Insurance Company be heard and disposed of by the court sitting in equity prior to the issue raised by the complaint filed by the plaintiffs in the action at law in which a jury trial has been demanded by the plaintiffs.

The present appeal to this court was taken from the said order of the district court entered December 29, 1941. The defendant has moved this court to dismiss the appeal upon the ground that the order from which the appeal was taken is not an appealable order.

Question

The United States Circuit Court of Appeals for the Third Circuit, being in doubt as to whether the order appealed from is an order granting an injunction and, therefore, ap-

pealable under Section 129 of the Judicial Code (28 U. S. C. § 227) as construed by the Supreme Court in Enelow v. New York Life Insurance Company, 293 U. S. 379, in the light of the effect upon that decision of the union of law and equity in one form of action accomplished by Rule 2 of the Federal Rules of Civil Procedure, adopted pursuant to Section 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064 (28 U. S. C. § 723c), and in view of the considerations advanced by the Circuit Court of Appeals for the Second Circuit in the case of Beannit Mills, Inc. v. Eday Fabric Sales Corporation, 124 F. 2d 563, hereby certifies the fol-

[fol. 4] lowing question of law concerning which it desires instruction for the proper decision of the above entitled case, to wit:

In a civil action in a district court upon a claim of a character formerly cognizable at law in which the defendant has filed a counterclaim of a character formerly cognizable in equity (or in an action at law under the provisions of Section 274b of the Judicial Code), is an order that the issue raised by the counterclaim shall be heard and disposed of by the court prior to the issue raised by the complaint an order granting an injunction within the meaning of Section 129 of the Judicial Code and therefore appealable under that section?

Albert B. Maris, Circuit Judge; William Clark, Circuit Judge; Charles Alvin Jones, Circuit Judge.

[fol. 5] Clerk's Certificate to foregoing paper omitted in printing.

Endorsed on Cover: File No. 46,456, U. S. Circuit Court of Appeals, Third Circuit, Term No. 1128, Adrian Ettelson, Joseph A. Feder, Jack Rinzler, et al., vs. Certificate. Metropolitan Life Insurance Company. Filed April 9, 1942, Term No. 1128 O. T. 1941.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 70.

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, *et al.*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF PLAINTIFFS.

ARTHUR T. VANDERBILT,
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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 70.

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, *et al.*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

BRIEF ON BEHALF OF PLAINTIFFS.

Statement.

The question of the appealability of the order of December 29, 1941 arose in the following manner. Plaintiffs had instituted an action at law against defendant in the New Jersey Supreme Court to recover the death benefits of certain life insurance policies. On defendant's application the suit was removed to the United States District Court for the District of New Jersey and thereafter the defendant served an answer to the complaint and a counterclaim for cancellation and rescission of the policies, both the answer and counterclaim alleging fraud in the procurement of the policies. Upon plaintiffs' motion to dismiss the counterclaim the District Judge ruled that although this Court has in similar cases held that the equitable remedies of

cancellation and rescission will be denied since the relief at law is adequate* the doctrine of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64 (1938) compelled the court to permit the counterclaim to stand because it alleges sufficient grounds for equitable relief in the Court of Chancery of New Jersey (42 F. Supp. 488). As a consequence of this ruling an order was made denying plaintiffs' motion to dismiss the counterclaim and staying a jury trial of the issue raised by the complaint until after a non-jury trial of the issue raised by the counterclaim. Plaintiffs sought a review in the Circuit Court of Appeals for the Third Circuit of the propriety of this order. The defendant by motion questioned the appealability of the order and the Circuit Court of Appeals certified the question to this Court.

Summary of Argument.

The plaintiffs took their appeal pursuant to the provisions of Section 129 of the Judicial Code, 26 Stat. 828 (1891), as amended, 28 U. S. C. § 227 (1940), which permits appeals from interlocutory orders granting injunctions. It is plaintiffs' contention that since the order stays the trial of plaintiffs' legal action until after the trial of defendant's equitable counterclaim, it is in substance a preliminary injunction and therefore appealable under the section cited.

The Circuit Court's question if answered in the negative, as defendant urges, will produce a situation under which a beneficiary of a life insurance policy who brings an

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*e. g. *Buelow* v. *New York Life Insurance Co.*, 293 U. S. 379 (1935); *Adamos* v. *New York Life Insurance Co.*, 293 U. S. 386 (1935); *Phoenix Mutual Life Insurance Co.* v. *Bailey*, 13 Wall. 616 (1871).

action thereon will be denied a jury trial until he first defends in a non-jury trial the insurance company's claim to cancellation of the policy—without being afforded the opportunity to have an appellate court pass upon the question whether the claim to a right of cancellation was properly injected into the case. An affirmative answer, on the other hand, will enable the beneficiary before being put to the expense and delay of a separate trial on the company's counterclaim, to obtain a review of the lower court's determination that the insurance company may convert a jury action on the policy into a non-jury action for cancellation by the mere filing of an equitable counterclaim.

ARGUMENT.

The order is appealable under Section 129 of the Judicial Code, 26 Stat. 828 (1891), as amended, 28 U. S. C. § 227 (1940).

The District Judge, after denying plaintiffs' motion to dismiss the counterclaim, effectively enjoined a jury trial of the issues raised by the plaintiffs' complaint and defendant's answer until a non-jury trial on the defendant's counterclaim shall have been held. Such an order has injunctive force and, although interlocutory, is appealable by virtue of Section 129 of the Judicial Code which provides in part:

> "Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or

> refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; * * *"

It will be seen that this section permits an appeal to the Circuit Court of Appeals "Where, upon a hearing in a district court * * * an injunction is granted * * * by an interlocutory order or decree." This Court in *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379 (1935) held that the defense of fraud in the procurement of a life insurance policy was a legal defense to the action already begun and an order directing that an equitable defense should be heard first amounted to a preliminary injunction and was appealable under the section quoted above. The insurance company had sought and the district court allowed a trial of the equitable issue "by a chancellor according to equity procedure in advance of the trial by jury at law of any purely legal issues" (293 U. S. at 381). This Court directed the district court to vacate its order for a hearing in equity and proceed with the trial of the action at law. The ruling in the *Enelow* case has often been and is still being invoked.

Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 293 U. S. 449 (1935);

New York Life Insurance Co. v. *Panagiotopoulos*, 80 F. (2d) 136 (C. C. A. 1st, 1935);

Daniels v. *Brown Shoe Co.*, 77 F. (2d) 899 (C. C. A. 1st, 1935);

Metropolitan Life Insurance Co. v. *Banion*, 86 F. (2d) 896 (C. C. A. 10th, 1936);

Kneberg v. *H. L. Green Co., Inc.*, 89 F. (2d) 100 (C. C. A. 7th, 1937);
Modin v. *Matson Navigation Co.*, 128 F. (2d) 194 (C. C. A. 9th, 1942);

See also:

Deckert v. *Independence Shares Corp.*, 311 U. S. 282, 287 (1940);
King Mechanism & Engineering Co. v. *Western Wheeled Scraper Co.*, 59 F. (2d) 546 (C. C. A. 7th, 1932);
Taylor v. *Spurway*, 72 F. (2d) 97 (C. C. A. 5th, 1934);
Colorado Central Power Co. v. *City of Englewood*, 89 F. (2d) 233 (C. C. A. 10th, 1937).

The defendant concedes that prior to the adoption of the Federal Rules of Civil Procedure the order here in question would have been appealable under the ruling in the *Enelow* case (Brief, p. 3). Defendant argues, however, that procedural changes brought about by the promulgation of the Federal Rules of Civil Procedure have done away with this right of appeal. The defendant's argument is manifestly unsound.

The plaintiffs' cause of action was originally asserted as an action at law in the New Jersey Supreme Court. There plaintiffs would have been entitled to a trial by jury on the issues raised by the plaintiffs' complaint and the defendant's answer. The removal of the action to the federal court did not impair this right to a jury trial and plaintiffs would have had their day in court upon the case being reached in regular course on the calendar of jury causes. However, the defendant interposed a counterclaim patterned after the separate bill in equity which is recog-

nized in the Court of Chancery of New Jersey. Such a bill raises equitable issues triable before the Chancellor—in the federal court to the Judge as a Chancellor.* When the matter finally abided in the federal court, therefore, it was an action involving a complaint by plaintiffs and an answer by defendant raising legal issues triable before a jury, and a counterclaim by defendant raising (improperly, as plaintiffs contended in the district court) equitable issues triable before a judge without a jury. It became, as defendant contends, a civil action in which both legal and equitable relief are obtainable in the same proceeding (Brief, p. 10). If the circumstance thus presented is similar to that which prevailed in the *Enelow* case the defendant's argument is shown to be devoid of merit. Let us, then, examine the situation as it existed at the time of the decision in the *Enelow* case.

Prior to the adoption of the Rules of Civil Procedure a party was permitted by virtue of section 274b of the Judicial Code, 38 Stat. 956 (1915), to set up in his answer an equitable defense which would be heard as though it were on a separate bill. In a single action both legal and equitable issues were adjudicated. As Chief Justice Taft, speaking of the practical effect of section 274b, pointed out in *Liberty Oil Company* v. *Condon National Bank*, 260 U. S. 235, 242 (1922):

> "The situation thus produced was quite like that under state civil codes of procedure in which there is but one form of civil action, the formal distinction

* From early times appeals were allowed to be taken from interlocutory orders made in the New Jersey Court of Chancery granting or refusing to grant an injunction against prosecution of a law action. Yard v. Pacific Mutual Ins. Co., 10 N. J. Eq. 480 (E. & A. 1856). This right is now declared by statute. New Jersey Revised Statutes, 1937, 2:29-117.

> between proceedings in law and equity is abolished and remedies at law and in equity are available to the parties in the same court and the same cause."

And in *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U. S. 430, 432 (1932), this Court in holding that an interlocutory order dismissing an equitable counterclaim is appealable, said:

> "It is clear that in this suit the court in a single decree may finally determine the merits of the cause of action alleged in the complaint and the counterclaim set up in the answer."

Thus even before the adoption of the Rules of Civil Procedure *technical* distinctions between proceedings at law and in equity had been abolished. *United States* v. *Richardson*, 223 Fed. 1010, 1013 (C. C. A. 4th, 1915); *Stamey* v. *United States*, 37 F. (2d) 188, 189 (D. C. Wash., 1929); *Hartford Fire Insurance Co.* v. *Nance*, 12 F. (2d) 575, 580 (C. C. A. 6th, 1926). Although a distinction between a law side and an equity side was recognized its effect was mainly to differentiate issues triable by jury from those triable by a judge without a jury. Cf. *Johnson* v. *Capital Life Insurance Co.*, 78 F. (2d) 369, 370 (C. C. A. 9th, 1935); *Keatley* v. *United States Trust Co.*, 249 Fed. 296 (C. C. A. 2d, 1918) cert. dis. 254 U. S. 658.

At the time of the decision in the *Enelow* case, therefore, both equitable and legal issues were disposed of in one action and Chief Justice Hughes in that case adverted to this, saying, "the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court" (293 U. S. at 382). Then, as under the present practice, in the same court and in the

same action one judge was empowered to preside over the trial before a jury of the legal issues and himself determine the equitable issues. But when this same judge ordered that the jury trial should be stayed until the equitable issues were decided he in effect issued a preliminary injunction, thereby enabling the aggrieved party to obtain a review in an appellate court of the propriety of an order which would permit the interposition of an equitable issue and its determination by the court before a jury trial of the legal issues could be had. *Enelow* v. *New York Life Insurance Co., supra.*

What, then, is the nature of the change effected by the Rules of Civil Procedure which defendant claims has abrogated this right of appeal? Defendant contends that Rule 2, by providing that "There shall be one form of action to be known as 'civil action' ", has now made it possible to have both legal and equitable relief in the same proceeding; that an injunction staying trial of the legal issue until after disposition of the equitable issue is no longer possible. The conclusive answer to this argument lies in the fact that what was done in the *Enelow* case and what defendant says *cannot* now be done actually *was* accomplished in the present case. The order, prepared by the attorneys for defendant and entered upon their motion, provides that "the issue raised by the counterclaim of the Metropolitan Life Insurance Company be heard and disposed of by the court sitting in equity prior to the issue raised by the complaint filed by the plaintiffs in the action at law in which a jury trial has been demanded by the plaintiffs." The question is not whether Rule 2 has rendered section 274b of the Judicial Code ineffective but

rather whether this order of the District Judge has the same injunctive force as had the order in the *Enelow* case. In point of fact the District Judge has enjoined the trial of plaintiffs' claim until the happening of a contingency, namely, the disposition of the issue raised by defendant's counterclaim as, for example, was done in the early case of *Pennsylvania Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 55 Fed. 131 (C. C. A. 5th, 1893). There an intervenor in a suit to foreclose a mortgage obtained an order which set aside a temporary order appointing a receiver and stayed proceedings in the suit until further order. On a motion to dismiss an appeal from this interlocutory order the court said (p. 136):

> "In our opinion, to order, at the prayer of one party, that all further proceedings in the cause shall be stayed until the further order of the court, is to grant an injunction, within the meaning of the seventh section of the act of March 31, 1891. It follows that the appellee's motion to dismiss this appeal must be denied."

See also *Zalatuka* v. *Metropolitan Life Insurance Co.*, 108 F. (2d) 405 (C. C. A. 7th, 1939).

Moreover, in view of the particular circumstances of this case it is especially difficult to comprehend defendant's argument that under the changed practice there is only one proceeding and the order appealed from "can no longer validly be regarded as an injunction of a separate proceeding" (Brief, p. 12). The defendant by filing its counterclaim sought to cancel the contracts which form the basis of plaintiffs' action. Had the action not been removed to the federal court defendant's remedy would have been an

independent action in the Court of Chancery of New Jersey. Does it lose its identity as a separate proceeding because designated a counterclaim? A counterclaim is substantially a cross action by the defendant against a plaintiff and it "secures to defendant the full relief which a separate action at law, a bill in Chancery, or a cross bill would have secured him on the same state of facts." 57 C. J. p. 366 § 11. As the court noted in *Hann* v. *Venetian Blind Corporation*, 15 F. Supp. 372, 376 (D. C. Cal., 1936):

> "A counterclaim is a cause of action in favor of a defendant upon which he might have sued the plaintiff and obtained affirmative relief in a separate action—whether it arises out of the contract or transaction on which plaintiff's claim is bottomed or not. • • • This assertion of a right of action in the defendant is of the very essence of a counterclaim. By it, the defendant becomes an actor in the suit. And thus each party is at once a plaintiff and defendant. • • • It is so far an independent action as that it must be pleaded with like sufficiency as the law requires, if a new and independent action were brought by the defendant against the plaintiff."

See *Farr* v. *Dato*, 99 F. (2d) 703 (C. C. A. 7th, 1938); *Schram* v. *Lucking*, 31 F. Supp. 749 (D. C. Mich., 1940), aff'd 117 F. (2d) 160; *Brown Paper Mill Co.* v. *Agar Mfg. Corp.*, 1 F. R. D. 579 (D. C. N. Y., 1941).

Rule 13 of the Rules of Civil Procedure governs "counterclaim and crossclaim" and it is significant that subdivision (i) of that rule permits the entry of a separate judgment on a counterclaim. To say, therefore, that the defendant's equitable counterclaim is not separate and dis-

tinct from the plaintiffs' complaint is to disregard the nature and effect of a counterclaim. Its distinctiveness was emphasized in *Daniels* v. *Brown Shoe Co.*, 77 F. (2d) 899 (C. C. A. 1st, 1935) where in holding an order to be appealable under the ruling in the *Enelow* case, the court said:

> "• • • the bill is not an equitable defense; it is, as it is entitled, a counterclaim. The plaintiff moved to strike it out. The District Judge allowed the motion, struck out the counterclaim, and put the case on the law list for trial."

So far is the separate identity of the plaintiffs' action and the defendant's counterclaim observed that an appeal from the dismissal of a counterclaim cannot now await the final determination of the cause but must be taken within the time allowed for appeals from final judgments. *Jefferson Electric Co.* v. *Sola Electric Co.*, 122 F. (2d) 124 (C. C. A. 7th, 1941). Even the claims of one party against another asserted in a single action are severable to such an extent as to permit an immediate appeal from a judgment on one of the claims while the other is still pending. *Reeves* v. *Beardall*, 316 U. S. 283 (1942); *Sidis* v. *F-R Pub. Corp.*, 113 F. (2d) 806 (C. C. A. 2d, 1940), cert. den. 311 U. S. 711. This Court in the *Reeves* case held that separate judgments may be entered on distinct claims in a single action—a holding which involves a recognition of the fact that a civil action is not necessarily a unified whole in which there can be no segregation of claims, equitable or legal, and in which there can be only one final judgment, as defendant claims (Brief, p. 18). By clear implication this Court has shown in the *Reeves* case that a civil action may be comprised of separate proceedings which may be dealt with severably.

It is quite apparent, therefore, that defendant's contention that the plaintiffs' and the defendant's respective actions are merely phases of one proceeding which the court cannot adjudicate independently of one another lacks reality. The court is now often called upon to act as both law judge and chancellor in a single cause, as was true prior to the adoption of the Rules of Civil Procedure, and numerous cases tend to evidence the limited effect of the so-called fusion of law and equity. Indeed, the order from which plaintiffs have appealed is living proof that the fusion is a type of symbiosis. The distinction between law and equity must persist as a constitutional requirement.* *Bennett* v. *Butterworth*, 11 How. 669 (1850); *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235 (1922). What was an action at law is still an action at law, and what was a bill in equity is still a civil action founded on principles of equity. See *Williams* v. *Collier*, 32 F. Supp. 321 (D. C. Pa., 1940); *Fraser* v. *Geist*, 1 F. R. D. 267 (D. C. Pa., 1940); *Ransom* v. *Staso Milling Co.*, 2 F. R. D. 128 (D. C. Vt., 1941); *Fitzpatrick* v. *Sun Life Assurance Co. of Canada*, 1 F. R. D. 713 (D. C. N. J., 1941). In order to comply with the Seventh Amendment to the federal constitution which preserves jury trials "in suits at common law" it is essential to determine whether the cause of action pleaded would have entitled the party to a jury trial at common law. See, e. g. *Bellavance* v. *Plastic-Craft Novelty Co.*, 30 F. Supp. 37 (D. C. Mass., 1939) where the court said:

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* The Constitution recognises the traditional distinction between these two collateral systems of jurisprudence. Art. III, section 2, paragraph 1 provides that: "The judicial power shall extend to all cases, in law and equity, arising under this constitution * * *." The Seventh Amendment provides that: "In suits at Common Law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *." The Eleventh Amendment provides that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity * * *."

> "Inasmuch as this amendment applies only to suits at common law, a distinction will always need to be drawn between suits at law and suits in equity in order to determine whether one has a right, under the Constitution, to have the issues of the case determined by a jury."

Accord: *Ransom* v. *Staso Milling Co.*, 2 F. R. D. 128 (D. C. Vt., 1941); *Fitzpatrick* v. *Sun Life Assurance Co. of Canada*, 1 F. R. D. 713 (D. C. N. J., 1941); *Comfy Mfg. Co.* v. *Dyer-Gruen Jackson, Inc.*, 2 F. R. D. 293 (D. C. Pa., 1942); *Folmer Graflex Corporation* v. *Graphic Photo Service*, 41 F. Supp. 319 (D. C. Mass., 1941); *Berman* v. *Automobile Insurance Co. of Hartford*, 2 F. R. D. 94 (D. C. N. J., 1941).

The federal courts are repeatedly called upon to determine whether a proceeding should be placed in the category of equitable causes. See *Axt* v. *London & Lancashire Indemnity Co.*, 42 F. Supp. 1013 (D. C. Wis., 1942) "• • • this was an equitable proceeding"; *Folmer Graflex Corporation* v. *Graphic Photo Service*, 41 F. Supp. 319 (D. C. Mass., 1941) "This action is in the nature of an old action in equity"; *Lawyers Trust Co.* v. *W. G. Maguire*, 2 F. R. D. 310 (D. C. Del., 1942) "The petition • • • is an appeal to the power of this Court as a Court of Equity." Dean Pound's remark in "Fifty Years of American Equity" (1936) 50 Harv. L. Rev. 171, 179-181 that "Equity continues to exist though separate equity practice disappears" is appropriate in relation to the present federal practice. See also Holdsworth, Equity (1935) 51 L. Q. Rev. 142, 159-161 emphasizing the necessity for the study of equity as a separate subject in England sixty-one years after the Judicature Acts of 1873 and 1875 united the Court of Chancery,

the common law courts and certain other courts into one Supreme Court of Judicature. And see Chafee and Simpson, *Cases on Equity* (1934) Preface at X.*

Thus, while the Rules of Civil Procedure establish a uniform procedure for both law and equity suits, the practical effect has been to continue the earlier practice in matters requiring a segregation of law and equity. The character of the court as a court of equity or a court of law, depending upon the nature of the causes alleged, has been recognized in the District Court's order, the resulting effect of which is to duplicate the situation which existed in the *Enelow* case.

The defendant's argument was apparently inspired by the views of Judge Charles E. Clark in *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corp.*, 124 F. (2d) 563 (C. C. A. 2d, 1942). In that case the question was simply whether an order refusing trial by jury constituted a final judgment. There had been a demand by a counterclaimant for a jury trial on the issues of both the complaint and the counterclaim, and it was held that an order annulling the jury demand was not an appealable order. Judge Clark, allud-

* The distinction is important for reasons other than to differentiate between jury and non-jury causes. Federal courts apply state statutes of limitations which are predicated upon an "action at law" or a "suit in equity". *Williamson* v. *Columbia Gas & Electric Corp.*, 110 F. (2d) 15 (C. C. A. 3rd, 1939) cert. den. 310 U. S. 639 (1940). The federal court may award additional costs in an "equity" cause. *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 312 U. S. 81 (1941). Injunctions may be granted only in equity causes. *Fleming* v. *Peavy-Wilson Lumber Co.*, 38 F. Supp. 1001 (D. C. La., 1941). See *Cavicchi* v. *Mohawk Mfg. Co.*, 27 F. Supp. 961 (D. C. N. Y., 1939); Bunn, Jurisdiction and Procedure of the Courts of the United States (4th ed. 1939) 178-180. The necessity for differentiating between legal and equitable claims and the difficulty encountered when equitable and legal claims are joined in the same suit are illustrated in the following cases: *Fraser* v. *Geist*, 1 F. R. D. 367 (D. C. Pa., 1940); *Ransom* v. *Staso Milling Co.*, 3 F. R. D. 128 (D. C. Vt., 1941); *Frissell* v. *Rateau Drug Store*, 28 F. Supp. 816 (D. C. La., 1939).

ing to this Court's "ingenious reasoning", expressed dissatisfaction with the *Enelow* case. But the *Enelow* case was obviously not applicable since the order appealed from—the order annulling the jury demand—was an interlocutory order without any injunctive force. There was no direction that the trial of a legal issue be stayed until after the disposition of an equitable issue; nor was there a refusal to stay the trial of one issue until another had been decided. The order if it was to be considered appealable at all would have to be a final order under Section 128 of the Judicial Code, 28 U. S. C. § 225 (1940). This it was not, as the court correctly held. Judge Clark also properly remarked of the case before him, "This is not the *Enelow* case", but he proceeded to question the applicability of the doctrine of the *Enelow* case on its own facts. As we have shown, however, the Rules of Civil Procedure have in no way altered the injunctive effect of the order appealed from.

Although Judge Clark's expressions of opinion concerning the Rules are given weight by the courts, as defendant points out (Brief, p. 13), we advert to his opinion in *Sherwood* v. *United States*, 112 F. (2d) 587 (C. C. A. 2d, 1940), involving the applicability of the Rules of Civil Procedure in suits under the Tucker Act, and to the opinion of this court reversing, *United States* v. *Sherwood*, 312 U. S. 584 (1941), in which Judge Clark's interpretation was found erroneous.

Judge Clark in his expression of opinion was largely influenced by the view of Professor Moore (3 Moore's Federal Practice, p. 3026), quoted on page 15 of defendant's

brief. But, it is significant that Moore discredited the theory of the *Enelow* case as applied on the facts actually there presented to the court and would, therefore, be more than ready to reach the conclusion that the Rules of Civil Procedure have done away with the right of appeal recognized in the *Enelow* case. Such a view overlooks the realities of the situation which confronts the parties and, as we have already shown, is not warranted in the present case.

The decision of the Circuit Court of Appeals for the Third Circuit in *Cohen* v. *Globe Indemnity Co.*, 120 F. (2d) 791 (C. C. A. 3rd, 1941), cited on page 16 of defendant's brief, is also not pertinent. There while awaiting a retrial of an action on policies of burglary insurance the plaintiff filed a petition for reformation which was treated as a petition to amend the complaint. The court allowed the amendment and after a hearing the policy was reformed and the case set down for trial. The Circuit Court's only concern was whether this order for reformation was a "final decision" and found that it was not. The decision on its own facts is questionable. Cf. *Reeves* v. *Beardall*, 316 U. S. 283 (1942); *Jefferson Electric Co.* v. *Sola Electric Co.*, 122 F. (2d) 124 (C. C. A. 7th, 1941). But regardless of whether the order there in question was a final appealable order it is clear that it lacked injunctive force and hence was not an appealable interlocutory order. The order there appealed from did not enjoin a trial on plaintiff's action; in fact, it directed that the parties proceed with the jury trial. The same court that decided the *Cohen* case has certified the question now before the court. Apparently the court did not consider that its approach in that case was applicable to the facts of the present case.

On the other hand the continued vitality of the doctrine of the *Enelow* case is evidenced by the very recent decision of the Circuit Court of Appeals for the Ninth Circuit in *Modin* v. *Matson Nav. Co.*, 128 F. (2d) 194 (C. C. A. 9th, 1942), where the court considered whether a judgment transferring a civil cause to the admiralty calendar was appealable. The court held that it was unnecessary to determine whether the judgment was a final one since even if it was interlocutory "it was, in effect, an interlocutory judgment granting an injunction restraining further proceedings at law and hence was appealable under § 129 of the Judicial Code, 28 U. S. C. A. § 227", citing the *Enelow* case.

In the present case the District Judge, exercising his injunctive power, has effectually enjoined a jury trial of plaintiffs' action until such time as defendant has had a non-jury trial on the equitable counterclaim. The manifest purpose of the statute permitting appeals from interlocutory orders granting injunctions is to enable a party to seek immediate appellate relief from an order the continuance of which may seriously prejudice his interests. Upon grounds argued to the District Judge the plaintiffs contend that the defendant's counterclaim should be dismissed. If defendant's argument on the question of the appealability of the order is sustained not only can a review in an appellate court of the question of the propriety of the counterclaim not be had but the issue on the counterclaim will be tried while plaintiff's action reposes on the calendar of jury cases. The desirability of having the question of the propriety of the equitable counterclaim determined at this time is apparent. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 525 (1897).

In *State* v. *District Court of First Judicial Dist.*, 117 P. (2d) 494, (Mont., 1941) the extraordinary writ of prohibition was invoked to prevent the lower court from hearing a legal issue as an equity cause without a jury. Said the court:

> "The trial of the case would undoubtedly cost considerable and, if the plaintiff is entitled to a jury as we have found she is, any judgment rendered in the case would not be binding upon her. We believe in such a situation this court should interpose its extraordinary power to correct the error of the district court at this stage of the case."

Similar considerations govern on the question now before this Court. The decision of the District Judge below from which plaintiffs have appealed, is as far reaching as it is unusual. It holds that the doctrine of *Erie Railroad Company* v. *Tompkins, supra,* has overruled the principle laid down by this Court in *Phoenix Mutual Life Insurance Co.* v. *Bailey,* 13 Wall. 616 (1871) which has been consistently followed by this Court and the lower courts. The District Judge decided that even though the insured is no longer available to give his version of alleged misrepresentations in procuring the insurance, a law action brought by the beneficiaries for death benefits can be converted by the insurance company into a cancellation suit by the mere expedient of filing an equitable counterclaim—thereby effectively dispensing with Section 16 of the Judiciary Act of 1789, 28 U. S. C. § 384 (1940) and the Seventh Amendment. The merits of that decision are not now before the Court for determination; but the desirability of a review of that decision at this stage of the proceeding—prior to costly and time-consuming trials—is manifest. Such con-

siderations undoubtedly influenced this Court in the *Enelow* case. There, under the precise situation which exists in the present case, this Court determined that before a plaintiff may be compelled to proceed to a trial without a jury on the issue of the insured's alleged fraud in the procurement of the insurance contract, he may obtain a review of the question whether such issue was properly injected into the case. This right of review is a substantial, valuable, remedial right which is favored in the law. *In re Hurley Mercantile Co.*, 56 F. (2d) 1023, 1025 (C. C. A. 5th, 1932) cert. den. 286 U. S. 555; *In re Madonia*, 32 F. Supp. 165 (D. C. Ill., 1940). It should not be lightly annulled as defendant urges.

Conclusion.

An order directing that the issue raised by an equitable counterclaim shall be heard and disposed of by the court prior to the legal issue raised by the complaint and answer has injunctive force and is appealable under Section 129 of the Judicial Code. The question certified by the court below should, therefore, be answered in the affirmative.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 70.

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, *et al.*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF METROPOLITAN LIFE INSURANCE COMPANY.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 70.

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, *et al.*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF METROPOLITAN LIFE INSURANCE COMPANY.

Citation of Opinion Below.

The question certified to this Court has not been discussed in any opinion delivered herein by the Courts below. The question certified arose on defendant's motion to dismiss plaintiff's appeal from an order entered by District Judge Walker pursuant to his decision, in which he sustained the validity of the counterclaim, as contained in an opinion reported in 42 Fed. Supp. 488.

Statement of Jurisdiction.

This case comes to the Supreme Court on certificate from the United States Court of Appeals for the Third Circuit.

Statement of the Case.

The legal question presented for decision is stated by the Circuit Court of Appeals in its certificate as follows:

> "In a civil action in a district court upon a claim of a character formerly cognizable at law in which the defendant has filed a counterclaim of a character formerly cognizable in equity (or in an action at law under the provisions of Section 274b of the Judicial Code), is an order that the issue raised by the counterclaim shall be heard and disposed of by the court prior to the issue raised by the complaint an order granting an injunction within the meaning of Section 129 of the Judicial Code and therefore appealable under that Section?"

The manner in which this question was presented to the Circuit Court of Appeals is set forth in the statement of facts contained in its certificate to this Court. Briefly, the situation was that plaintiff instituted an action at law in the New Jersey Supreme Court to recover the benefits of certain life insurance policies. The case was removed to the Federal Court. The defendant insurance company filed an answer alleging defenses of fraud and also filed a counterclaim seeking rescission of the policies on the ground of material false statements in the applications. A motion to strike out the counterclaim was argued before Judge Walker, who, on December 29, 1941, entered an order denying the motion to strike and further ordering that the issue raised by the counterclaim be tried and disposed of by the Court prior to the jury trial on the issue raised by the complaint. Plaintiff thereupon appealed to the Circuit Court of Appeals on the ground that the Court erred in refusing

to strike out the counterclaim. The defendant countered with a motion to dismiss that appeal, contending that the order was not an appealable order. This motion to dismiss the appeal was resisted on the ground that that feature of it which ordered that the issue raised by the counterclaim be heard and disposed of first, was in effect an injunction. Hence the question certified to this Court arises from the defendant's motion to dismiss the appeal, and the sole question presented is: Is the order of December 29, 1941, an appealable order? The essence of the question presented is whether or not the order of December 29, 1941, constitutes an injunction.

Summary of Argument.

With respect to the former practice in the Federal Courts whereby equitable defenses were allowed to be interposed in law actions by virtue of Section 274b of the Judicial Code (28 U. S. C. A. 398), this court held in *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379 that an order directing that the issues raised by the equitable defense be tried in advance of the issues raised by the complaint filed on the law side of the Federal Court constituted, in effect, an injunction, and hence that such order was appealable under Section 129 of the Judicial Code (28 U. S. C. A. 227). We contend that the doctrine of the *Enelow* case has no application to the present procedure, which is regulated by the Federal Rules of Civil Procedure, and hence that an order of the District Court directing that the issues raised by a counterclaim seeking equitable relief be tried by the court and disposed of in advance of the issues raised by a complaint seeking money damages, can no longer be regarded as an injunction or as an appealable interlocutory order.

ARGUMENT.

The appellate jurisdiction of the Circuit Courts of Appeals is set forth in section 128 of the Judicial Code (28 U. S. C. A. 225). With respect to interlocutory orders, such jurisdiction is limited to those orders or decrees specified in section 129 of the Judicial Code (28 U. S. C. A. 227), the material parts of which read as follows:

> "Where, upon a hearing in a district court, or by the judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree * * * an appeal may be taken from such interlocutory order or decree to the circuit court of appeals * * *".

Prior to the adoption of the Federal Rules of Civil Procedure, this Court held that an order similar to that entered herein on December 29, 1941, constituted in effect the granting of an injunction against the prosecution of the law action, and hence came within the scope of section 129 of the Judicial Code. *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379.

However, in view of the procedural changes brought about by the promulgation of the Federal Rules of Civil Procedure, the weight of opinion holds that the doctrine of the *Enelow* case now has no application, and that an order such as that entered herein on December 29, 1941, can not now be regarded as an order granting an injunction or as an appealable order.

The basic question presented by the certificate is whether the doctrine laid down by this Court in *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, still re-

tains its validity and vitality in view of the changes in the procedure of the Federal Courts effectuated by the promulgation and application of the Federal Rules of Civil Procedure.

In order to determine this question, an analysis of the *Enelow* case and of the changes made by the Rules, is necessary.

In the *Enelow* case the plaintiff instituted an action at law on a life insurance policy which was removed to the Federal Court. In its affidavit of defense, the defendant asked to have the policy cancelled because of the insured's false and fraudulent statements in the application. The District Court entered an order that the equitable issue raised in the affidavit of defense be heard by the court sitting in equity and in advance of the jury trial of any purely legal issues. It was this order which this Court held constituted the granting of an injunction and hence an appealable order.

In coming to this conclusion, Chief Justice Hughes, who wrote the opinion for the court, drew a distinction between an order entering a stay in the same proceeding and an order enjoining the prosecution of an entirely separate proceeding. Because of the established differentiation then recognized under existing procedure in the Federal Courts between an action at law and a suit in equity, the court went on to regard the District Court's order as essentially an injunction of an entirely separate proceeding. The Chief Justice said, beginning at 293 U. S. 381:

> "The decree of the District Court was interlocutory, and the question is whether it can be considered to be one granting an injunction and thus within

the purview of section 129 of the Judicial Code (28 U. S. C. A. 227) permitting appeal.

"This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of section 129. And, in this aspect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court, in view of the established distinction between 'proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity.' Per Van Devanter, J., in *Griesa* v. *Mutual Life Insurance Co.*, 165 Fed. 48, 50, 51.

"When the Congress enacted section 274b of the Judicial Code, providing for equitable defenses in actions at law and the granting of affirmative equitable relief, the procedure was simplified but the substance of the authorized intervention of equity was not altered."

* * * * * *

"It is thus apparent that when an order or decree is made under section 274b, requiring, or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an

> equitable jurisdiction, in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose."

It will be observed that the Court, in the *Enelow* case, approached the problem then before it with the attitude which had grown up during the period when proceedings in law and in equity were distinct in nature and conducted in entirely separate and mutually hostile tribunals. The power of Chancery to enjoin proceedings in the law Courts was exercised as early as the reign of Henry VII, and, indeed, this constituted one of the articles of impeachment against Cardinal Wolsey. It was the subject of the notable controversy between Lord Coke and Lord Ellesmere in the time of James I. See *Story on Equity Jurisprudence,* Sec. 51, Sec. 874, and Note in 1 Chafee and Simpson, *Cases on Equity*, page 35.

The need for this branch of equity jurisdiction, and the purpose to be served by its exercise, arose from the fact that legal and equitable remedies were being administered in separate Courts, and that the parties could not have their controversy completely determined in either one. Thus it is stated in *Kerr on Injunctions*, page 13:

> "A defendant to an action at law has often some equitable defence which a Court of law cannot take cognizance of either by reason of want of jurisdiction, or from the infirmity of legal process. As it would be against conscience and good faith that the plaintiff at law should use the advantage of which he is thus possessed at law, a Court of equity will restrain by injunction an action at law where the right sought to be enforced by the action is subservient to an equitable claim which the defendant at law cannot set up there."

See also *Story on Equity Jurisprudence*, Sec. 875, and *Commercial Trust etc. Bank* v. *Hamilton*, 99 N. J. Eq. 492. Compare *Miles* v. *Illinois Central Railroad Co.*, 315 U. S. 698.

In the *Enelow* case, this Court was confronted by a situation lying half way between the traditional and complete separation of law and equity proceedings and the present dispensation, under Rule 2 of the New Rules, which fuses law and equity proceedings into one form of civil action. That half way station was the practice springing from section 274b of the Judicial Code (28 U. S. C. A. Sec. 398), which authorized equitable defenses to be interposed in actions at law. The effect of this section, and of 274a, was characterized thus by Chief Justice Taft in *Liberty Oil Co.* v. *Condon Bank*, 260 U. S. 235, at page 243:

> "To be sure, these sections do not create one form of civil action as do the codes of procedure in the States, but they manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible, and are long steps toward code practice."

The final "long step" has now been taken, and Section 274b of the Judicial Code has been superseded by Rule 2 of the Federal Rules of Civil Procedure. Thus, the statutory basis underlying the *Enelow* case has now been swept away.

The power to effect a procedural union of law and equity suits was specifically given to the Supreme Court by Congress, 48 Stat. 1064, (28 U. S. C. A., sec. 723c). That act provides, *inter alia:*

> "The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both * * *"

Pursuant to the authority thus given, it is provided in Rule 2 of the Federal Rules of Civil Procedure:

> "There shall be one form of action to be known as 'civil action' ".

Insofar as its effect upon previous federal legislation is concerned, this Rule is to be given the force and effect of a Congressional enactment. Compare *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 9. See also *John R. Alley & Co.* v. *Federal National Bank*, (C. C. A.—10) 124 Fed. (2) 995; 52 Harvard Law Review, p. 1002, 1004 n. 13.

Furthermore, in the Notes of the Advisory Committee on Rules, it is stated that Rule 2 supersedes section 274b of the Judicial Code relating to equitable defenses. The Notes of the Advisory Committee have been frequently recognized by the lower courts as an authoritative guide to the proper construction of the Federal Rules of Civil Procedure.

See for example:

Beach v. *Beach*, (App. D. C.) 114 Fed. (2) 479;
Ripperger v. *A. C. Allyn & Co. Inc.* (C. C. A.—2) 113 Fed. (2) 332, 334;
Sherwood v. *U. S.* (C. C. A.—2) 112 Fed. (2) 587, 590;
Carpenter, Babson & Fendler v. *Condor Pictures, Inc.* (C. C. A.—9) 110 Fed. (2) 317, 320;

Food Machinery Corp. v. *Gingnard,* (D. C.-Ore.) 26 Fed. Supp. 1002;

U. S. v. *Aluminum Co. of America,* (S. D.-N. Y.) 1 F. R. D. 71, 76.

These various considerations lead irresistibly to one conclusion: that the action of Congress in authorizing the Supreme Court to formulate the Rules of Civil Procedure and the action of the Court in promulgating Rule 2 have rendered section 274b of no effect, and have thus destroyed the statutory basis of the holding in the *Enelow* case that the order appealed from was in effect an injunction. Hence we now have a situation where the fiction that a Federal District Judge had separate individuality and separate powers as a Chancellor and as a Law Judge, can no longer be maintained. The District Court no longer has a law side and an equity side. No longer is a proceeding instituted as either an action at law or a suit in equity. Both legal and equitable relief are now obtainable in the same proceeding and under the same rules of procedure.

The requirements of the 7th Amendment to the Constitution which preserves jury trials "in suits at common law" is still preserved under the new Rules (See Rule No. 38). While trial by jury is a basic right in suits at common law, which may not be taken away, the procedure by which such right may be given effect is subject to modification from time to time. *Walker* v. *Southern Pacific Railroad,* 165 U. S. 593; *Ex Parte Peterson,* 253 U. S. 300; *Gasoline Products Co. Inc.* v. *Champlin Co.,* 283 U. S. 494.

The new Rules have now established in effect, one Civil Court. There is no longer a Federal Court of Law and a

Federal Court of Equity. The same individual holding the judicial office no longer lightly changes himself from a Court of Law to a Court of Equity, or vice-versa. He is solely and simply Judge of a Civil Court, administering justice according to uniform rules of procedure. In the order now in question, no Court designated to try an action at law is enjoined. There is no such Court to enjoin, and there is no party in an action at law to be enjoined. When this case began in the New Jersey Supreme Court, it was in every respect an action at law. New Jersey very strictly observes the distinction between remedies at law and remedies in equity and the enforcement thereof by separate tribunals. *N. J. Constitution*, Art. 6, Sec. 1; Art. 10, Sec. 1; See *Estate of Gilbert Smith, Inc.* v. *Cohen*, 123 N. J. Eq. 419; *San Giacomo* v. *Oraton Investment Co.*, 103 N. J. Eq. 273.

Plaintiffs' counsel, bred to the New Jersey practice, so far forgot the changes in the Federal practice made by the new Rules, that he worded his motion to strike as on the ground that "the defendant has an adequate remedy on the law side of the Federal Court in the action at law instituted in the New Jersey Supreme Court". See Certificate, page 2, line 10.

But removal of the case to the Federal Court wiped out this sharp distinction. It became merely a civil action, to be proceeded with according to the Federal Rules of Civil Procedure. The order did not enjoin anything or anybody. It would be foolish to say that the Court enjoined itself. All that the order did was to provide that one phase of the case should be tried before another phase of the case was tried.

If, on the hearing of this first phase of the case, the Court should hold that the policies of insurance should be cancelled, there would be obviously no occasion for the Court to consider the second phase of the case as to whether the plaintiffs should receive the proceeds of the policies. On the other hand, if the Court on the trial of the first phase of the case should hold that the policies should stand, the second phase of the case would then for the first time become pertinent, and the Court could go into the question of how much, if anything, the plaintiffs should recover.

The result is that the order which is the subject of the appeal in this case to the Circuit Court of Appeals, can no longer validly be regarded as an injunction of a separate proceeding, but must be considered as a mere stay of one phase of the proceedings entered by the Court in the exercise of its "inherent power to control the progress of the cause so as to maintain the orderly processes of justice." *Enelow* v. *New York Life Insurance, supra,* at page 382. See also *Landis* v. *North American Company,* 299 U. S. 248, 255; *American Life Insurance Co.* v. *Stewart,* 300 U. S. 203, 215; *Emery* v. *Central Trust & Safe Deposit Co.,* (C. C. A. 6) 204 Fed. 965.

Such an order, being interlocutory, is not appealable. *Schoenamsgruber* v. *Hamburg Line,* 294 U. S. 454; *Cover* v. *Schwartz,* (C. C. A. 2) 112 Fed. (2) 566; *Zalatuka* v. *Metropolitan Life Ins. Co.,* (C. C. A. 7) 108 Fed. (2) 405.

The foregoing analysis is fully supported by the recent decision of the Second Circuit Court of Appeals in *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.,* 124 Fed. (2) 563. This case is of especial interest and authority because the opinion was written by Judge Charles E. Clark, who was

formerly the Reporter to the Advisory Committee appointed by the Supreme Court to draft the Rules.* The question presented to the court was stated by Judge Clark as follows at 124 Fed. (2) 564:

> "The question herein is whether or not an order refusing trial by jury constitutes a final and appealable judgment of the district court.
>
> "Plaintiff sued for a declaratory judgment and extensive injunctive and other relief against a patent, owned and used by defendants, for a method of knitting. Defendants counterclaimed for a judgment declaring the patent valid and infringed. They also filed demand for trial by jury of all the issues of both complaint and counterclaim. On separate motions by plaintiff the district court dismissed the counterclaim and then 'annulled' defendant's jury demand because 'no jury trial as matter of right attends plaintiff's cause of action,' and 'Counterclaim has been dismissed, no attempt has been made to show any other issue entitled to jury trial.' This appeal is taken from this second or annulment order only."
>
> • • • • • •
>
> "Plaintiff has moved to dismiss this appeal as being taken from only an interlocutory, nonappealable order, and not the final order required by 28 U. S. C. A. section 225. Defendants, however, rely upon the case of *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440, where, by ingenious reasoning based upon the then divided law

* As illustrative of the weight given by the lower courts to the views of Judge Clark in interpreting the Rules, see, for example, *Kuenzel* v. *Universal Carloading & Distributing Co.*, 29 Fed. Supp. 407, 409; *S. E. C.* v. *Timetrust, Inc.*, 28 Fed. Supp. 34, 41; *Bankers Bond & Mortgage Co.* v. *Witherow*, 1 F. R. D. 197, 198; *U. S.* v. *Schine Chain Theatres*, 1 F. R. D. 205, 207; *State of Maryland* v. *Pan-American Bus Lines, Inc.*, 1 F. R. D. 213, 215; *Diepen* v. *Fernow*, 1 F. R. D. 378; *Smith* v. *Belmore*, 1 F. R. D. 633, 635.

and equity procedure of the federal courts, the Court held an order transferring an action from the law to the equity side of the court as the equivalent of an equity decree staying an action at law and hence appealable as an order granting an interlocutory injunction under 28 U. S. C. A. section 227. But we think there are two complete answers to this contention: first, that this is not the *Enelow* case, and second, that the *Enelow* case is not applicable to present-day federal practice where law and equity are united in a single civil action, which affords all appropriate relief to all the litigants before the court."

It is the court's reasoning on the second proposition which, we submit, should be followed in disposing of the question at bar. The court stated at 124 Fed. (2) 565:

"Hence we turn to the second point, that the entire analysis is out of place for that united system of law and equity which the Supreme Court acting under section 2 of the Enabling Act of June 19, 1934, c. 651, sections 1, 2, 48 Stat. 1064, 28 U. S. C. A. sections 723b, 723c, ordered as its initial step in fashioning the new rules (order of June 3, 1935, 295 U. S. 774) and which has been one of the most successful and useful accomplishments of that reform. Pike and Fischer, Pleadings and Jury Rights in the New Federal Procedure, 88 U. of Pa. L. Rev. 645, 665-670. For it all presupposes two different systems of justice administered by separated tribunals, even if no more than different 'sides' to the same court; and when that separation is abandoned, the premise upon which these cases depend is gone. Hence, as Professor Moore so succinctly demonstrates, the Enelow case cannot remain controlling after its basis

has been removed. 3 Moore's Federal Practice 3025, 3026. Indeed, except as we resort to the old dichotomy, with all its useless complications, so remote from our modern legal habits, we lack any rationale to explain the concept of a judge enjoining himself when he merely decides upon the method he will follow in trying the case. The metamorphosis of a law judge into a hostile chancelior on the other 'side' of the court could not have been overclear to the lay litigant under the divided procedure; but if now without even that fictitious sea change one judge in one form of action may split his judicial self at one instant into two mutually antagonistic parts, the litigant surely will think himself in Alice's Wonderland. We therefore hold the order not now appealable; error may, of course, be assigned as to it if review of final judgment is ultimately had."

In 3 *Moore's Federal Practice*, page 3026, the effect of the Rules upon the doctrine of the *Enelow* case, is discussed as follows:

"The theory of the *Enelow* case is not applicable under the Rules. Its theory was undoubtedly sound as applied to old English practice when there were separate law and equity courts, since an equitable defense could not be interposed in the common law courts and the defendant in the law action did go into chancery and actually seek an injunction against the law action. The theory of the *Enelow* case becomes questionable as applied in the case actually presented to the Supreme Court, since there were no longer separate courts and Congress had merely enlarged the defenses available in a law action by providing for equitable defenses. But there remained a law side and an equity side of the court, with sep-

> arate procedures, and this disunion may justify the result. Such a result could not be justified under the union of law and equity contemplated by the Rules. It is anachronistic to think in terms of an injunction against a law action in a procedure which has only a civil action and does not have actions at law and suits in equity."

See also 4 *Pomeroy's Equity Jurisprudence* § 1370.

An illustration of the proper judicial approach to questions involving the effect of Rule 2 is furnished by the opinion of the Third Circuit Court of Appeals in *Cohen* v. *Globe Indemnity Co.*, 120 Fed. (2) 791. The question there presented was whether or not the order appealed from constituted a final judgment. That was a suit to recover on two policies of burglary insurance. The first trial had resulted in a judgment for plaintiff, which had been reversed on appeal. While the case was awaiting retrial, the plaintiff filed an amendment to his complaint, which in effect added a count for reformation of the policy. Subsequently, after hearing, the trial judge entered an order that the contract be reformed as prayed, and listed the case for retrial. From this order, the defendant took an appeal, and the Circuit Court of Appeals, on motion, dismissed the appeal, on the ground that the order did not represent a final judgment in the case, even though it did terminate the "equity" phase. Judge Goodrich, speaking for the court, said at 120 Fed. (2) 791:

> "The appellant argues that prior to the adoption of the new rules such an order would have been appealable. He contends that prior to the new rules where reformation was sought of an instrument upon which an action at law had been begun, the petition

for reformation would have had to have been filed on the equity side of the court, the action at law being stayed meanwhile. He says further that if, in the equity proceedings, reformation were ordered, an appeal would lie from that order."

• • • • • •

"Under the present practice the system is unified. Rule 2, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. Does the coalescing of law and equity mean that the decision is not final until the litigation on what, under the prior practice would have been both the law and equity sides, has been completed in the trial court? We conclude, with full recognition of the inconvenience to the defendant in the particular case, that it does. There is only one law suit pending between the parties. As an incident in the trial of that suit, the trial judge has ordered a reformation which affects the terms of the agreement between them. But no judgment has been rendered. The defendant is neither under an obligation to pay money nor has he the protection of a judgment which exempts him from payment. Indeed the trial judge very carefully refrained from doing what an equity court in former days would have done, namely, to finish up the litigation before him as chancellor by awarding damages for breach of contract following its reformation, since the defendant had asked for jury trial and Rule 38, Rules of Civil Procedure, was thought to entitle him to it. We have litigation which is then half through. We have a statute which says we are limited in review to final decisions. The appeal must therefore fail.

"Many attempts at procedural improvement during the 19th century were only partially successful because both courts and lawyers trying cases carried

> into the new practice the technical niceties of the old. A better fate should await the present rules. We have no desire to approach the change made by rule two with 'a psychological attitude which goes back to the historical conflict between Coke and Ellesmere.'
>
> "The appeal is dismissed."

This decision is significant because it holds that a civil action is essentially a unity, even though both legal and equitable remedies are sought therein, and is not merely the harnessing together of two separate entities. As applied to the question certified to this court, the doctrine of the *Cohen* case leads to the conclusion that the suit at bar is but one civil action and not two separate suits consolidated for decision, and hence that the provisions contained in Judge Walker's order of December 29, 1941, are to be regarded as only a procedural step in the cause in which it was entered, and not as an injunction of an entirely separate proceeding.

Also significant on this question is the Note of the Advisory Committee commenting on Rule 39 of the Federal Rules of Civil Procedure, which deals with trial by jury or by the court. The Committee states therein:

> "When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried."

This statement certainly indicates that the Committee which drafted the Rules contemplated that the trial court, in the exercise of "its inherent power to control the progress of the cause so as to maintain the orderly processes

of justice," could dispose of the non-jury issues in advance of the jury issues. It is inconceivable that the Committee intended, by this comment, to nullify the effect of Rule 2 and to open the door to unnecessary interlocutory appeals.

As stated in Rule 1, the object of the Rules is "to secure the just, speedy, and inexpensive determination of every action." Certainly that purpose would not be furthered by a construction of Rule 2 which permits multiple appeals.

Furthermore, it has been a matter of unvarying policy to discourage interlocutory appeals in the federal courts. Thus prior to 1891, there was no method whatever of reviewing on appeal an interlocutory order or decree of the District or Circuit Courts. Cf. *Drentzer* v. *Frankfort Land Co.*, (C. C. A. 6) 65 Fed. 642, 644. Today, the situations in which an interlocutory appeal may be taken are strictly limited by section 129 of the Judicial Code. (Compare the practice in New Jersey, for example, where an appeal may be taken from any interlocutory order in Chancery proceedings. Revised Statutes of 1937, 2:29-117.) It is clear, therefore, that Congress does not favor interlocutory appeals. Nor do the courts. See *Cobbledick* v. *United States*, 309 U. S. 323; and remarks of Judge Frank in *Perkins* v. *Endicott Johnson Corp.*, (C. C. A. 2), 128 Fed. (2) 208, 211.

To sum up, therefore, the effect of Rule 2 is to destroy the statutory basis upon which the decision of this court in *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, rested, and to create a situation where an order by the trial court that the issues on a counterclaim seeking equitable relief be tried by the judge in advance of a trial by a jury of the issues on a complaint seeking money damages, can no longer be validly regarded as an injunction. This is the

result of the analyses of the problem made by Judge Charles E. Clark and by Professor Moore. It is also the result indicated by the treatment accorded to Rule 2 in *Cohen* v. *Globe Indemnity Co.*, 120 Fed. (2) 791; as well as by various notes of comment by the Advisory Committee on Rules followed by the lower courts and by the settled policy of discouraging interlocutory appeals in the federal courts.

In conclusion, we submit that the question certified should be answered in the negative: First, because the order appealed from is an interlocutory order which is not an injunction, and secondly, because the system of procedure under the Federal Rules of Civil Procedure renders the doctrine of the *Enelow* case no longer applicable.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 70.

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, *et al.*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF ON BEHALF OF METROPOLITAN LIFE INSURANCE COMPANY.

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We believe that a few comments on plaintiffs' brief will be of assistance to the Court.

The argument contained in plaintiffs' brief does not lead to an affirmative answer of the question certified because:

(A) Counsel's analysis of the situation prior to the adoption of the Federal Rules of Civil Procedure (Brief, pp. 6-8) overlooks the sharp line of demarcation between the law side and the equity side of the Federal Court which was the basis of this Court's reasoning in the *Enelow* case; and

(B) It overlooks the change which Rule 2 of the Federal Rules of Civil Procedure has made by transforming what was held in the *Enelow* case to be an injunction of a separate proceeding, into a mere stay of the same proceeding.

A.

Plaintiffs' analysis of the situation prior to the adoption of the Federal Rules of Civil Procedure (Brief, pp. 6-8) overlooks the sharp line of demarcation between the law side and the equity side of the court, which was the basis of this Court's reasoning in the *Enelow* case.

It is essential to remember that prior to the adoption of the new Rules, the law and equity sides of the District Court were as distinct as the criminal, bankruptcy, or admiralty sides now are from each other and from the civil side of the court. The distinction between the law and equity sides was based upon the separate procedures in each: State practice, pursuant to the Conformity Act, governing the conduct of actions at law, and rules promulgated by this court governing procedure in suits for equitable relief. Furthermore, the clerk of the District Court was required to keep separate record books for law and equity proceedings. Equity Rule 3. Congress in Sections 274a and 274b of the Judicial Code (28 U. S. C. A., Sections 397, 398) referred specifically to the law side and the equity side of the court. Indeed, so sharp was the line dividing them that a Congressional enactment was necessary to enable a cause to be transferred from one side of the court to the other. Judicial Code, Section 274a (28 U. S. C. A., Section 397). Prior to that enactment, a case started in the wrong side of the court had to be dismissed. *Rogers* v. *Durant*, 106 U. S. 644; *Buzard* v. *Houston*, 119 U. S. 347. These considerations furnish ample reason why this Court in the *Enelow* case regarded the law and equity phases of a case as separate proceedings pending in different tribunals.

All this is what now has been changed by the adoption of the Federal Rules of Civil Procedure. The division

between the law and equity sides of the court has been wiped out. Rule 2 has superseded Section 274b of the Judicial Code. Equity Rule 3 has been succeeded by Rule 79, which requires the clerk to keep one single docket for all civil cases regardless of whether legal or equitable relief or both may be sought therein. The provisions in Rule 79(c) for separate calendars for "jury actions" and "court actions" is obviously necessary in the practical handling of the work of the Court, nor does it mean a carry-over of the old distinction between law actions and equity suits, since, in view of the implied waiver of jury trial provided for in Rule 38(d), many claims for money damages are now tried by the Court sitting alone.

Nor does the case of *Modin* v. *Matson Navigation Company*, 128 Fed. (2) 194 (cited p. 5 and p. 17 of plaintiffs' brief) indicate that the doctrine of the *Enelow* case is still applicable to the situation at bar. The *Modin* case involved an order transferring a case from the civil to the admiralty docket. The admiralty and civil sides of the District Court today are just as distinct as the law and equity sides were prior to the new Rules. The *Modin* case does not say that the law and equity sides still exist, and it does not constitute the application of the doctrine of the *Enelow* case to a situation governed exclusively by the Federal Rules of Civil Procedure. The *Modin* case is not in point.

All of the other cases cited by the plaintiffs in their brief (pp. 4 and 5), as invoking the doctrine of the *Enelow* case, were decided prior to the effective date of the new Rules and hence are not in point.

B.

Furthermore, the plaintiffs' analysis of the situation as affected by the adoption of the Rules of Civil Procedure

(p. 8ff.) overlooks the basic distinction between a stay and an injunction. The statement on page 8 that "what was done in the *Enelow* case and what defendant says *cannot* now be done, actually *was* accomplished in the present case," indicates the complete ignoring of this distinction. True, in the case at bar, as in the *Enelow* case, the trial by a jury of the issues raised on plaintiffs' claim for money damages is to be delayed until after a trial by the Court of the issues raised on defendant's claim for rescission of the contract, but the significant question is whether such a ruling by the trial judge is to be regarded as a stay of the same proceeding pending in the same court or as an injunction of a separate proceeding pending in a different Court, in accordance with the distinction laid down by this Court in the *Enelow* case and discussed at length by Judge VanDevanter in *Griesa* v. *Mutual Life Insurance Company*, 165 Fed. 48, 50, 51. (see p. 6 and p. 12 of our main brief).

We say that the promulgation of Rule 2 of the Federal Rules of Civil Procedure has had the effect of changing what was held in the *Enelow* case to be an injunction of a separate proceeding, into a stay of the same proceeding. This is because the former separate law and equity sides of the court have been fused into one civil side, and because the former different procedures in law and equity matters have been succeeded by one uniform system of procedure. Our argument is not answered by calling attention to the substantive distinction between law and equity which still persists in the federal courts. The question certified does not deal with this distinction. It merely deals with a question of procedure. It is still true as Dean Pound observed that "equity continues to exist though separate equity practice disappears" (plaintiff's brief, p. 13). Under the new Rules the same remedies are obtainable as could

have been obtained formerly in either a law court or an equity court; the same facts must still be shown to entitle a party to the kind of relief which he seeks as was formerly the case; a party still has the same right to a jury trial that he has alway had. In other words, substantive rights, the principles of decision which determine what kind of relief, if any, a party is entitled to in a given situation, and the distinction between legal and equitable rights and remedies still remain unchanged. We do not deny these things. On the contrary, they form the substantive basis of the counterclaim herein.

But while these distinctive legal and equitable rights still stand, the procedure for their enforcement has been changed. The Federal Rules of Civil Procedure, while preserving the substantive distinction between law and equity, have abolished the procedural distinction, so that it cannot now be said that the case at bar, which lies entirely within the civil side of the District Court, and every phase of which is controlled by the same rules of procedure, constitutes two separate proceedings pending in two separate courts. Accordingly, it seems perfectly clear that the postponement of the jury trial of the issues raised by plaintiffs' complaint until after the trial by the court of the issues raised by the counterclaim must, in accordance with the distinction laid down by this court in the *Enelow* case, be regarded as a stay and not as an injunction.

On pages 10 to 11, plaintiffs argue that the counterclaim constitutes a separate proceeding because of the provisions in Rule 13(i) for entry of separate final judgment on a counterclaim. Not so.

Rule 13(i) provides for separate judgment only where there has been a separate trial as provided in Rule 42(b). These rules must be read in connection with Rules 8(a) and

18, which permit joinder of claims and rem dies, and with Rules 38 and 39, which deal with the form trial for various issues in the cause. It is clear that separate trials of various issues in a case do not transform one proceeding into several separate and distinct litigations. That this is particularly true under the Federal Rules of Civil Procedure is demonstrated by what Judge Charles E. Clark said for the Second Circuit Court of Appeals in *Sherwood* v. *United States*, 112 Fed. (2) 587 (reversed on other grounds, 312 U. S. 584) at 591:

> "But it is a commonplace of the state code action, with its possible numerous and diverse issues, that different forms of trial may be necessary for different issues. Such necessity does not prevent the all-inclusive nature of the action and the procedural gains which result from a settlement of all angles of a dispute in a single adjudication. The new federal rules expressly adopt this practice. Form of trial is determined for each issue, not for the action as a single unit. Rules 38 and 39; James, Trial by Jury and the New Federal Rules of Procedure 45 Yale L. J. 1022; Pike and Fischer, Pleadings and Jury Rights in the New Federal Procedure, 88 U. of Pa. L. Rev. 645."

Nor does the fact that such a final judgment may be appealable indicate that the counterclaim is part of a separate proceeding pending in a different court from the action based on plaintiffs' claim. Plaintiffs' argument is contrary to the whole theory of appeals in the Federal Court, which is that, generally speaking, the actions and rulings of the Trial Judge in conducting a case may not be reviewed until after final judgment. Judicial Code Section 128 (28 U. S. C. A., Section 225). The only interlocutory orders

which are appealable are those whose effect extends beyond the manner in which the cause is to proceed to final judgment, namely, orders relating to injunctions and receivers. Judicial Code Section 129 (28 U. S. C. A., Section 227).

For as Judge Goodrich aptly said in *Cohen* v. *Globe Indemnity Co.* (C. C. A.—3) 120 Fed. (2d) 791:

> "We are confronted at the outset with the question whether this appeal is premature. Our jurisdiction is not discretionary; it is settled by statute. Neither the parties nor the court can hear a question just because it would be convenient for everyone to have an authoritative ruling upon a question at some stage of the litigation prior to its completion."

Such being the situation created by Congress, the Federal Rules of Civil Procedure, as part of their effort to speed up the administration of justice, provide in Rule 54(b) for the entry of separate judgments with respect to separate phases of the case, so that an appeal may be had as promptly as possible. This is the basis upon which this Court grounded its decision in *Reeves* v. *Beardall*, 316 U. S. 283.

Rule 54(b), which was before this Court in the *Reeves* case, provides for entry of judgment at various stages only "upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim". The significance of this Rule lies in its recognition that plaintiffs' claim and a counterclaim arising out of the same transaction (such as is the situation at bar) constitute a unity and that one may not be disposed of by the Court without reference to the other. Rule 54(b) is a complete answer to plaintiffs' argument that the complaint and the

counterclaim herein constitute separate proceedings pending in different courts.

In *Reeves* v. *Beardall*, 316 U. S. 283, a judgment dismissing the Second Count of the complaint was held final, and hence appealable. But the Second Count was a claim based on entirely different transactions from those forming the basis of the other counts in the complaint, and it was for this reason that the judgment of dismissal was held final and appealable. The *Reeves* case is not relevant for present purposes because the facts were different from those in the instant case and because the legal question presented was entirely different. There is no suggestion whatever in the *Reeves* case that a complaint and counterclaim which are both based upon the same transaction constitute separate litigations in separate tribunals.

Conclusion.

Plaintiffs' argument is premised upon the *Enelow* case. They accept the doctrine of that case and contend that the application of that doctrine to the situation presented herein leads to the conclusion that the order of December 23, 1941, constitutes an injunction, and hence is appealable.

However, if the plaintiffs accept the doctrine of the *Enelow* case at all they must accept all of it. The cornerstone of the doctrine of the *Enelow* case is the distinction which this court carefully pointed out between an injunction—"the power to stay proceedings in another court"—and "a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice."

The question certified to this court requires a determination of which side of the line thus drawn the present case falls. We submit that the order of December 29, 1941, falls clearly within the category of a stay which the District Court entered with respect to part of the proceedings pending before it, and that it is anachronistic (see *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 169) to say that that order constituted an injunction of proceedings in another court.

Respectfully submitted,

CONOVER ENGLISH,
NICHOLAS CONOVER ENGLISH,
Counsel for Metropolitan Life
Insurance Company.

SUPREME COURT OF THE UNITED STATES.

No. 70.—October Term, 1942.

Adrian Ettelson, Joseph A. Feder, Jack Rinzler, et al., vs. Metropolitan Life Insurance Company. } On Certificate from United States Circuit Court of Appeals for the Third Circuit.

[December 7, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

The Circuit Court of Appeals has certified the following question:

In a civil action in a district court upon a claim of a character formerly cognizable at law in which the defendant has filed a counterclaim of a character formerly cognizable in equity (or in an action at law under the provisions of Section 274b[1] of the Judicial Code), is an order that the issue raised by the counterclaim shall be heard and disposed of by the court prior to the issue raised by the complaint an order granting an injunction within the meaning of Section 129[2] of the Judicial Code and therefore appealable under that section?

From the certificate it appears that the question arises upon these facts: The plaintiffs filed, in a New Jersey State Court, a complaint in five counts to recover amounts alleged to be due plaintiffs by the defendant on life insurance policies issued by it upon the life of Richard Ettelson, deceased. The cause was removed to the United States District Court for New Jersey. Plaintiffs demanded a jury trial. The defendant filed an answer in the District Court setting up that the policies were obtained by the fraud of the insured and are void because of material false statements made by the insured in the application for the policies. The answer did not allege that the false statements were knowingly and intentionally made.

With the answer the defendant filed a counterclaim alleging that the policies were obtained by the fraud of the insured and are void because of the material false statements made by him in

[1] 28 U. S. C. § 398.
[2] 28 U. S. C. § 227.

the application; and prayed that the policies be decreed void upon the return by the defendant of the premiums paid thereon, and that the plaintiffs be enjoined from further prosecuting the action at law. The plaintiffs moved for dismissal of the counterclaim on the ground that the defendant has an adequate remedy at law on the law side of the court in the pending action in which issue has been joined; and further that the counterclaim fails to state a claim upon which equitable relief can or should be granted by the court.

The District Court denied the motion to dismiss and ordered that the counterclaim should be heard and disposed of by the court sitting in equity prior to trial of the issue made by the complaint and answer in the action at law. The plaintiffs thereupon appealed to the Circuit Court of Appeals and the defendant moved that court to dismiss the appeal in the view that the District Court's order is not appealable.

The parties agree that, if the question had arisen prior to the adoption of the Rules of Civil Procedure,[3] our decision in *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, would require an affirmative answer to the question. The defendant asserts, and the plaintiffs deny, that the rules require a negative answer. The defendant points to Rule 1 which states that the object of the rules is "to secure the just, speedy, and inexpensive determination of every action"; and more particularly to Rule 2 which declares that "there shall be one form of action to be known as 'civil action' ".

The defendant's contention, in brief, is that whereas, when the *Enelow* case was decided, the distinction between actions at law and suits in equity in federal courts still persisted, this distinction has now been abolished; that equitable defenses, whether a bar to plaintiffs' recovery at law or the basis of affirmative relief against the plaintiffs, are part and parcel of the single action initiated by the plaintiffs and that any direction by the court respecting the order in which the claim and the counterclaim are to be heard is interlocutory, amounting, at most, to a stay of the trial of one branch of the litigation, and in no sense an injunction against the plaintiffs. We cannot agree.

At the argument of the cause much time was devoted to the applicable law of New Jersey where the action originated. It

[3] 308 U. S. 653; 28 U. S. C. 723c.

was urged that, under that law, upon allegation and proof of innocent misrepresentations inducing the issue of a policy, an insurer is entitled to a decree cancelling the policy and restraining any action at law upon it. It was urged that this feature of the local law must be considered in determining the appealability of the District Court's order. But, whatever effect should be given the New Jersey law in determining the correctness of the District Judge's action, the local law has no bearing upon the decision of the narrow question certified.

As in the *Enelow* case, so here the result of the District Judge's order is the postponement of trial of the jury action based upon the policies; and it may, in practical effect, terminate that action. It is as effective in these respects as an injunction issued by a chancellor. If the order be found to be erroneous it will have to be set aside and the plaintiffs permitted to pursue their action to judgment. The plaintiffs are, therefore, in the present instance, in no different position than if a state equity court had restrained them from proceeding in the law action. Nor are they differently circumstanced than was the plaintiff in the *Enelow* case. The relief afforded by section 129 is not restricted by the terminology used. The statute looks to the substantial effect of the order made. *Enelow* v. *New York Life Insurance Co.*, *supra*, p. 383. Compare *General Electric Co* v. *Marvel Rare Metals Co.*, 287 U. S. 430, 432; *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, 451; *Griesa* v. *Mutual Life Ins. Co.*, 165 Fed. 48, 49.

Question answered "Yes".

A true copy.

Test:

Clerk, Supreme Court, U. S.